No. 20,091

United States Court of Appeals

For the Ninth Circuit

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, a corporation,

Appellant,

vs.

AMERICAN MOTORISTS INSURANCE COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment entered on March 3, 1965, by the United States District Court for the Northern District of California, Northern Division. The underlying action was brought by appellant Universal Underwriters Insurance Company (hereinafter referred to as Universal), a corporation, against American Motorists Insurance Company (hereinafter referred to as American), a corporation. The amount in controversy exceeded $10,000.00. The District Court's jurisdiction was invoked under 28 USC Section 1332, inasmuch as Universal is a citizen of the State of Missouri with its principal place of business and home office in the State of Missouri, and

American is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, is a citizen thereof, and has its principal place of business and home office in the State of Illinois. On March 10, 1965, appellant, Universal, filed a timely Notice of Appeal. This Court's jurisdiction accordingly rests on 28 USC Section 1291.

STATEMENT OF THE CASE

This is a suit by Universal to force American to reimburse Universal for all of its out-of-pocket expenses incurred while paying a compromise settlement to one Vickie Graf, a minor for Miss Graf's injuries. Universal in fact compromised Miss Graf's claim (at a figure conceded to be reasonable by American) and in this action seeks recovery of all sums paid to the guardian ad litem of Miss Graf together with all of its expenses incurred in connection with the defense of that action.

The basic facts underlying this suit are as follows, all of which are set forth in the Stipulation As To Certain Facts and Testimony of Witnesses filed with the trial court except as noted:

The principal parties to this action, i.e., Universal and American are insurance companies. At all times pertinent here, Universal insured under a policy, an exact copy of which was received by the trial court, a partnership known as "K. B. McCarthy" consisting of K. B. McCarthy, George Little, Royal E. McCar-

thy, and Floyd Todd. The partnership was engaged in the business of selling new and used automobiles with its principal place of business in Eureka, California.

At all times pertinent herein, American insured Crocker-Anglo National Bank, a national banking association, under a policy of insurance, an exact copy of which was received by the trial court.

On August 6, 1957, the partnership McCarthy (hereinafter referred to as "McCarthy") sold a new 1957 Dodge to one Cecil Wolf pursuant to a Conditional Sales Contract. McCarthy thereupon assigned the contract to Crocker-Anglo National Bank (hereinafter referred to as "Bank") and guaranteed the contract with recourse. Following the execution of the contract, the Dodge was registered with the Department of Motor Vehicles of the State of California with Wolf as the registered owner and Bank as the legal owner. The registration remained this way until June 30, 1958.

Prior to April 22, 1958, Wolf had defaulted on his contract. On April 22, 1958, Bank turned the account over to one Joseph Sheiber, who operated an independent collection agency in Eureka, California and retained him for its account to repossess this vehicle. On April 23, 1958 Sheiber repossessed the Dodge and delivered it directly to McCarthy at its place of business. McCarthy did not pay Bank until June 30, 1958, so that at the time of the episode in question (May 4, 1958) McCarthy was neither the registered nor legal owner.

On May 4, 1958, the Dodge, while being driven by Eris McCarthy, struck and injured a four year old girl, one Vickie Graf. Eris McCarthy is the wife of Royal E. McCarthy, one of the partners of "K. B. McCarthy". At the time of the accident Eris was driving the Dodge with the permission of the partnership McCarthy for her own personal use and not in the course or scope of McCarthy's business. (Findings of Fact No. 10.) Subsequent to the accident an action was filed on behalf of Vickie Graf by her guardian ad litem in the Superior Court of the State of California, in and for the County of Humboldt. An exact copy of the Complaint in that action was received by the trial Court. Upon service of the Summons and Complaint, McCarthy turned them over to Universal, who after making demand (which was refused) on American that it defend the action, defended Eris McCarthy in said action.

On February 1, 1960, Universal pursuant to valid Court Order approving the compromise paid $15,000.00 to the child's guardian ad litem in settlement of the suit filed by the guardian against Mrs. McCarthy. American concedes that the amount of the settlement was reasonable. In addition, Universal incurred expenses in said action in the sum of $1,746.92, which were reasonable.

In its complaint in this action Universal contended that American was required to reimburse it for the $15,000.00 settlement together with all of its out of pocket expenses incurred in the defense of that action. On March 3, 1965, the District Court entered Judg-

ment in favor of American and decreeing that Universal recover nothing.

This appeal followed.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in granting Judgment in favor of American and in denying the relief for which Universal prayed.

2. The District Court erred in holding that Eris McCarthy was not insured at the time under the American Motorists policy and further erred in not holding that said policy provided primary coverage to her.

3. The District Court erred in failing to find expressly that Eris McCarthy was driving the subject vehicle with the permission of the Bank.

SUMMARY OF ARGUMENT

The District Court found (and properly so) that at the time of the episode, Bank was the owner of the 1957 Dodge driven by Eris McCarthy. (See Findings of Fact No. 12.) Accordingly, Eris McCarthy was covered under American's policy for her liability, if any. Coverage was afforded under the "Definition of Insured" (Insuring Agreements III "definition of insured" contained in the American policy) because she had the implied permission of Bank to drive the vehicle. While it is true that Eris McCarthy was

also covered by the policy issued by Universal at said time and place, the coverage afforded by American is primary because of the language of the two "other insurance" clauses in the respective policies. The American policy (Paragraph XIV of "Conditions" of the American policy) provides that any liability under that policy is prorated with any other "valid and collectible insurance" in the event two policies cover an assured. The applicable portion of the Universal policy provides that any insurance afforded thereby is excess over any other valid and collectible insurance that is available in the event of dual coverage. Consequently, the insurance provided by American is primary, and it is required under the applicable law to reimburse Universal for the amounts paid by settlement and, in addition, to reimburse Universal for all of the expenses incurred by it in the defense of the injury action.

I. PREAMBLE.

California law is clear that in determining whether an insurance policy provides coverage, the Court must resolve all doubts in favor of the insured, and construe any ambiguities most strongly in favor of the assured and against the insurer. See *Continental Insurance Company v. Zurich Insurance Company* (1961) 57 C. 2d 27, 366 P. 2d 455.

Obviously, in this matter either or both policies could provide coverage to Eris McCarthy. Consistent with the above policy, in making a determination

whether a given insurance policy provided coverage, the Court should assume that it was the only policy in existence and thus must resolve all doubts in Eris McCarthy's policy. In short, in determining whether Eris McCarthy was covered by the American Motorist policy at the time of the episode, she is entitled to have all the ambiguities in the policy construed in her favor. In making the determination of whether there was coverage by the American Motorists policy, the Court should assume that it is the only policy in existence which might provide coverage to her.

II. ERIS McCARTHY WAS AN INSURED UNDER THE AMERICAN MOTORIST POLICY.

This follows because Crocker-Anglo Bank, the named assured under that policy was the owner of the vehicle and Eris McCarthy was using it with the bank's permission.

A. The Insuring Clause.

The policy itself states that Crocker-Anglo National Bank is the named insured. Under the Definition of Insured (Insuring Agreements III, definition of insured) the policy provides in part: "The unqualified word insured includes the named insured and also includes any person while using an *owned* automobile —providing the actual use of the automobile is by the named assured or with his permission * * *" (emphasis added). Thus Eris McCarthy is insured under that policy if the following two conditions are met:

(a) Bank was the owner of the vehicle.

(b) She was driving it with permission and consent of Bank.

B. Crocker-Anglo was the Owner of the Automobile.

The District Court specifically found this to be the fact (see Findings of Fact No. 12). There is ample evidence to support this finding, among it the statement in the Dealer Plan Agreement entered into between McCarthy and Bank which was in effect at the time of the accident. Part V of the Dealer Plan Agreement reads as follows: "Until payment is made, such *vehicle* in the contract shall be and remain the property in subject to the order of the Bank" (emphasis added). This, among other evidence, clearly supports the District Court's finding.

C. Eris McCarthy Was Driving the Vehicle With the Permission and Consent of the Bank.

Eris McCarthy had the permission, both actual and implied in law to drive the subject vehicle. *Souza v. Corti* (1943) 22 C. 2d 454, 139 P. 2d 645 and *Hobbs v. Motor Transport Co.* (1943) 22 C. 2d 773, 141 P. 2d 738, both hold that under California law an inference that an owner delivered a car to a permittee with permission for the permittee to use the car for *all purposes* is drawn from the mere surrender of possession by the owner.

In this instance, the evidence clearly shows that Sheiber, the person who repossessed the vehicle did so for the account of and at the instructions of Bank. The evidence is uncontradicted that the car was deliv-

ered to McCarthy without any restrictions on the use of the vehicle. Moreover, the District Court specifically found that at the time of the accident in question, the partnership McCarthy was the "bailee" of the car and that Eris McCarthy was driving the vehicle with the partnership's permission. (See Finding of Fact No. 10.) Under those circumstances, the above cited authorities make it clear that under California law Eris McCarthy was driving the vehicle with the permission of the Bank, the bailor. There was no finding in trial court that any conditions were imposed by the owner Bank upon the use by McCarthy of the vehicle and, in fact, there was no evidence upon which such a finding could be based. In fact, there was no testimony at the trial that McCarthy's use of the vehicle was in any way, shape or form restricted or were there any circumstances from which one can find such restrictions. Bank's witnesses testified that Bank didn't care what McCarthy did with the car so long as he paid for it.

The case of *Stewart v. Norsigian* (1944) 64 C. A. 2d 540, 149 P. 2d 46, demonstrates in a similar case that a person driving a vehicle under these circumstances does so with the permission of the owner-bailor.

III. ERIS McCARTHY WAS NOT EXCLUDED FROM COVERAGE UNDER THE AMERICAN MOTORIST POLICY BY ANY OF THAT POLICY'S PROVISIONS.

A. The Purported Exclusion Contained in Insuring Agreements III, Definition of Insured (B), Does Not Apply.

Under that clause, coverage is denied to one otherwise covered if they are an agent or employee of an automobile sales agency, with respect to any accident arising out of the operation thereof. This coverage is lost *only* if the accident arises *out of the operation* of an automobile sales agency. The issue is whether the vehicle is being used for business or for pleasure. In this instance, it was being used for pleasure and Mrs. McCarthy was not deprived of coverage.

California law is settled that insurance policies are construed most strongly against the insurer and in favor of the insured. See *Steven v. Fidelity & Casualty Co.* (1962) 58 C. 2d 862, 377 P. 2d 284, and *Southwestern Funding Corp. v. Motors Insurance Corp.* (1963) 59 C. 2d 91, 378 P. 2d 361.

B. Restrictive Endorsement Contained in the Policy (The Fourth Endorsement), Purporting to Restrict the Insurance Only to the Named Insured With Regard to Repossessed Automobiles, Is Not Enforceable.

The California Supreme Court has flatly held that restrictive endorsements under no circumstances are enforceable in California. *Interinsurance Exchange v. Ohio Casualty Insurance Company* (1962) 58 C. 2d 142, 373 P. 2d 640; *Wildman v. Government Employees Insurance Co.* (1957) 48 C. 2d 31, 307 P. 2d 359.

This endorsement actually reinforces our conclusion that Eris McCarthy is in fact covered under the policy. Without that endorsement, there is no provision excluding repossessed automobiles, and thus, in the absence of such an endorsement, repossessed automobiles (and Eris McCarthy) would be covered. Then for an additional premium ($979.00) an endorsement purporting to limit coverage already provided is added which attempts to limit the coverage and eliminate some assureds. In short, the insurer is charging more money and attempting to cut down coverage. This ambiguity between the main body of the policy and the endorsement must be construed in favor of the insured and against the insurer. *Steven v. Fidelity & Casualty Co.,* supra, and *Southwestern Funding Corp. v. Motors Insurance Corp.,* supra.

IV. AS ERIS McCARTHY WAS AN INSURED UNDER THE MAIN BODY OF THE AMERICAN MOTORISTS POLICY, THE "OTHER INSURANCE" CLAUSE OF THAT POLICY REQUIRES A PRORATION WITH OTHER "VALID AND COLLECTIBLE INSURANCE", IF ANY APPLIED.

If Eris McCarthy is an assured under the American Motorists policy, Paragraph 14 of the "Conditions" provides that that policy's liability is prorated with any other "valid" and collectible insurance available to her.

V. THE ONLY INSURANCE PROVIDED TO ERIS McCARTHY UNDER THE UNIVERSAL UNDERWRITERS POLICY IS ENDORSEMENT A 20 F "USE OF OTHER AUTOS—BROAD FORM."

Eris McCarthy is not a named assured on the policy. The named assured is K. B. McCarthy, a partnership consisting of certain specified individuals (not she). The only place she is covered under the policy is under the quoted endorsement. Eris McCarthy was not covered under Paragraph III (Definition of Insured) in the Insuring Agreement Section of Universal Underwriters policy because she was not using an automobile owned by the named insureds, it being owned by Crocker-Anglo Bank.

VI. ENDORSEMENT A 20 F, UNDER THE UNIVERSAL UNDERWRITERS POLICY SPECIFICALLY STATES THAT ANY INSURANCE AFFORDED THEREBY IS EXCESS OVER ANY OTHER "VALID AND COLLECTIBLE" INSURANCE THAT IS AVAILABLE.

The endorsement so states.

VII. UNDER CALIFORNIA LAW, IF INSURANCE COVERAGE IS PROVIDED TO ONE PERSON BY TWO POLICIES, ONE OF WHICH CONTAINS A "PRORATE" CLAUSE (AS IN THE AMERICAN MOTORISTS POLICY) AND THE OTHER OF WHICH CONTAINS AN "EXCESS" CLAUSE (AS IN THE UNIVERSAL UNDERWRITERS POLICY) THE PRORATE POLICY IS PRIMARY AND THE EXCESS POLICY IS SECONDARY.

American Automobile Company v. Republic Indemnity Company (1959) 52 C. 2d 507, 341 P. 2d 675;

Continental Casualty Company v. Zurich Insurance Company (1961) 57 C. 2d 27, 366 P. 2d 455, both so hold.

Since the American Motorists policy had limits relating to this accident of Five Hundred Thousand Dollars ($500,000.00), it provided the sole protection to Eris McCarthy for this accident.

VIII. SINCE THE AMERICAN MOTORISTS POLICY WAS THE POLICY PROVIDING PRIMARY COVERAGE TO ERIS McCARTHY, UNIVERSAL UNDERWRITERS IS ENTITLED TO RECOVER ALL OF ITS EXPENSE INCURRED IN HER DEFENSE IN THE GRAF ACTION.

For a square holding to that effect (overruling a series of prior California contrary cases), see *Continental Casualty Company v. Zurich Insurance Company,* supra.

IX. THIS COURT'S HOLDING IN TRUCK INSURANCE EXCHANGE v. AMERICAN SURETY COMPANY OF NEW YORK (1964) 338 F. 2d 811 (C.C.A. 9) IS NOT CONTRARY TO ANY OF THE POSITIONS URGED IN THIS CASE.

The District Court erroneously believed that the finding in this case was governed by *Truck Insurance Exchange v. American Surety Company of New York* (1964) 338 F. 2d 811 (C.C.A. 9).

Without belaboring the facts of the *Truck Insurance* case, the distinction between that matter and ours is that in that action there were two concurrent tortfeasors each of whom was directly negligent and each of whom was covered *by one, and only one*

insurance policy, for his primary liability. Of key importance is the fact that neither of the tortfeasors was covered by two insurance policies for his primary liability, which is the situation with Eris McCarthy here.

In the *Truck Insurance* case, the trial court determined that Wescott, an employee of J & W Logging Company and owner of premises was directly negligent, and further had determined that J & W Logging Company was directly negligent itself in failing to provide a safe place to work. Thus the trial court concluded that there were two concurrent tortfeasors. This Honorable Court correctly held that Wescott was covered by the Truck Insurance Exchange Policy which had been then issued to the truck owner as he was "using" the truck. Thus Wescott was in fact provided coverage by the Truck Insurance Exchange policy. Of key importance, however, was the fact that the American Surety policy issued to *J & W* insured it only and did not provide coverage to its employees. Thus Wescott was covered only by the *Truck Insurance policy* and J & W was covered only by the American Surety policy, for their direct liabilities. Consequently, the distinction between that case and this.

In the *Truck Insurance* case this Honorable Court correctly holds that J & W would be liable vicariously for Wescott's independent negligence, and further holds that as to that liability J & W could recover individually from Wescott and that his insurance company stands in the same shoes. However, since

Wescott and J & W had equal primary liabilities, and each was covered by only one insurer therefor, it was proper to split the liability between the two carriers.

We certainly concede the validity of the trial court's statement in this case that the insurance carriers here are in no different position than their respective insureds. Here, however, there is only one person having direct liability for the injury and the question is which of two insurance policies provide coverage and in the event of dual coverage, which policy afforded primary coverage.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's action in granting Judgment to appellee and denying appellant's request for relief was erroneous and should be reversed and the cause remanded with instructions to enter Judgment on behalf of appellant for $16,746.92, representing the stipulated amount of the settlement plus its out-of-pocket expenses incurred in the defense of the Graf action.

Dated, Eureka, California,
October 4, 1965.

Respectfully submitted,
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CLAYTON R. JANSSEN,
Attorneys for Appellant.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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